Employment Standards TRIBUNAL

Citation: Armand Norman (Re)
2019 BCEST 117

An appeal

- by -

Armand Norman
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2019/159

DATE OF DECISION: November 5, 2019

DECISION

SUBMISSIONS

Armand Norman — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Armand Norman (the "Appellant" or "Ms. Norman") has filed an appeal of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director") on August 30, 2019.

2. Ms. Norman filed four complaints under the *ESA* alleging that the Canadian Diabetes Association – Assoc Canadienne Du Diabete carrying on business as Diabetes Canada ("Diabetes Canada") contravened the *ESA*. The delegate determined that as Ms. Norman was not an employee of Diabetes Canada, the *ESA* did not apply to the complaints.

3. Ms. Norman appeals the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Ms. Norman also contended that evidence had become available that was not available at the time the Determination was being made.

4. This decision is based on the Appellant's written submissions and the section 112(5) "record" that was before the Director at the time the decision was made (the "Record").

FACTS AND ARGUMENT

5. Ms. Norman alleged that she began working at Diabetes Canada on August 1, 1995, and that her employment continued. She alleged that she was employed 24 hours per day, 7 days per week at a number of jobs including cook, janitor, legal assistant, and private investigator. She contended she was entitled to wages, overtime pay, annual vacation pay, and statutory holiday pay. The Appellant also contended that she had been harassed by an individual representing Diabetes Canada.

6. Diabetes Canada, a not-for-profit business which operates a number of provincial business, stated that it had no record of the Appellant being either an employee or a volunteer with any of their operations, nor had they solicited the Appellant to volunteer or work for their organization.

7. The delegate determined that the Appellant had never been an employee of Diabetes Canada and that the *ESA* did not apply to her complaint.

8. The Appellant argues that that Diabetes Canada "trafficked" her as an involuntary employee, kept her as a "hostage" in her residence, and criminally harassed her by telephone by suggesting that she take directions to be their unpaid involuntary worker.

9. Attached to the appeal are a large number of documents (over 200 pages) including 2002 and 2003 decisions of the Canadian Human Rights Tribunal relating to a complaint filed by the Appellant, Diabetes Canada policies and procedures as well as a number of the Appellant's medical reports from 2002.

ANALYSIS

10. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

11. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

> most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
>
> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

12. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that the Appellant has not met that burden.

13. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

Error of Law

14. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

15. Ms. Norman has not identified any errors of law which the delegate may have committed. Upon a review of the record, I find that the delegate's conclusions were rationally based on the evidence before him and that the delegate properly applied the relevant sections of the *ESA*.

16. The record discloses that the Appellant's original complaint was that Diabetes Canada was harassing her by calling her requesting that she work for them on a volunteer basis. It appears that Diabetes Canada made one or two unsolicited telephone calls to the Appellant asking if she would like to volunteer. It is unclear if anyone at Diabetes Canada actually spoke to the Appellant or whether voice mail messages were left.

17. There is no information in the complaint that the Appellant actually did work or volunteer for Diabetes Canada, even though she also indicated that she worked seven days per week, 24 hours per day. The delegate sought information from Diabetes Canada regarding the Appellant's allegations. Diabetes Canada had no record of the Appellant either volunteering or working for it or any of its agencies at any time. In the absence of any evidence either in the original complaint or on appeal that Ms. Norman was employed by Diabetes Canada, I find that she has not demonstrated any error of law in the Determination.

Failure to observe the principles of natural justice

18. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that Ms. Norman was denied natural justice.

19. I find that Ms. Norman had every opportunity to present her complaint as well as submit documentation supporting her allegations.

20. I therefore find no basis for this ground of appeal.

New evidence

21. In *Re Merilus Technologies* (BC EST # D171/03), the Tribunal established the following four-part test for admitting new evidence on appeal:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.

22. The material Ms. Norman submitted in support of her appeal is not relevant to the issue on appeal; that is, whether or not Ms. Norman was an employee of Diabetes Canada.

23. In my view, this information, even if it were properly new evidence according to the test set out above, would not have led the delegate to a different conclusion on the material issue before him. None of the material submitted on appeal demonstrates that Ms. Norman was an employee; rather, it relates to a variety of issues facing Ms. Norman in 2002, none of which relates to Diabetes Canada.

24. Therefore, I conclude that there is no reasonable prospect that the appeal will succeed and dismiss the application.

ORDER

25. Pursuant to section 115 of the *ESA*, I order that the Determination dated August 30, 2019, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal